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No. 84-4

Office - Supreme Court, U.S.
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In The Supreme Court
OF THE
United States

OCTOBER TERM 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, et al.,
Petitioners,
vs.
HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF AMICUS CURIAE OF
THE IRVINE COMPANY
IN SUPPORT OF RESPONDENT

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December, 1984

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

40 pp

QUESTION PRESENTED

Whether damages should be recoverable under the United States Constitution for a landowner/developer's injuries caused by a local government's application of land use regulations temporarily denying the landowner its reasonable, investment-backed expectation that it may proceed with its previously approved project.

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**BRIEF AMICUS CURIAE OF
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IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36.2 of the Rules of the Court, *amicus* The Irvine Company, a Michigan corporation ("Irvine"), files this brief *amicus curiae* with the written consent of all parties to the case. The letters granting such consent have been filed with the Clerk of the Court.

Irvine is one of the largest landowners and developers in the State of California. The Irvine Ranch comprises approximately one sixth of the land in Orange County, California. Since the 1960s Irvine has been engaged in the development of the master-planned "new town" of Irvine, California, together with extensive office, commercial, industrial and housing development in adjacent communities. Because it is extensively involved in the land development process and because a majority of its land is located in California, a national innovator in land use regulation, Irvine is greatly interested in the outcome of this case and the potential effects of the Court's decision.

SUMMARY OF ARGUMENT

In the absence of a clear rule extending Constitutional protection to a developer's reasonable, investment-backed expectations arising from reliance upon governmental approvals of a development project, a developer who has made substantial front-end investments in a large-scale planned unit development or planned community project must rely upon judicial application of state law vested rights standards for protection of its interests against subsequent government changes in the rules of development. The protection presently afforded under state law is, however, insufficient.

The Court of Appeals below was correct in its holding that a court's failure to find a project protected under vested rights doctrine is not dispositive of a federal takings claim, because a fundamental difference exists between state law vested rights doctrine and takings jurisprudence. The former fragments a project into discrete segments and identifies those portions, if any, for which a developer has the right to complete construction regardless of subsequent government action or discovery of new facts. The latter, however, examines the nature and extent of a developer's acts of investment which were made at the local government's direction or otherwise in reliance upon the initial governmental approvals and with respect to the property as a whole. This case invites the Court to establish a clear Constitutional rule grounded in the Fifth Amendment's command of "fairness" in order to provide sorely needed protection of a developer's reliance interest.

During the last fifty years, fundamental changes have occurred in the nature and scope of the land development process. The last fifteen years in particular have witnessed an enormous expansion in the array of local government land use regulations. The development flexibility made possible by the new generation of land use regulations interacts with market incentives and the increased capability of the development industry to permit planning and implementation of large-scale, long-term projects. At the same time, however, the inconsistent and unpredictable level of judicial protection afforded the investment required to initiate large-scale development, once it has been approved by local government, has created such a high level of uncertainty and risk in the land development process that large-scale development is becoming increasingly less likely to occur. Thus, the phased, discretionary-approval framework of modern land use regulations, coupled with uncertain judicial protection of private investment under state law vested rights

doctrines, discourages responsible master planning and implementation of large-scale projects of great potential benefit to society. The resulting social costs include excessive investment in smaller, single-phase projects, to which long-range planning techniques are less successfully applied, and increased housing prices.

Petitioners advance several policy considerations as justification for judicial imposition of an invalidation, as opposed to a takings, remedy. These arguments fail, however, not only because they lack empirical support, but also because they consider the effects of an interim damages remedy upon only one of the actors on the development process — the local government.

The availability of a damages remedy for regulatory takings would encourage rather than discourage responsible long-range planning, as this Court has previously recognized. There is at present no effective incentive to encourage local government to give early, comprehensive consideration to development proposals. By protecting developers from a government's last minute change in mind after the developer has made a substantial, reasonable investment in reliance upon the government's prior approvals of a project, imposition of an interim damages remedy will provide local government with an incentive to undertake more thoughtful consideration of projects at the initial approval stage, and discourage attempts to change development rules in midstream.

In conclusion, Irvine suggests criteria for application of a damages remedy based upon the doctrine of reasonable investment-backed expectations. These criteria focus upon standards for determining the reasonableness of investment, the nature of the investment interest to be protected, the extent to which government must be given an opportunity to modify or rescind the challenged regulation, and the measure of damages.

ARGUMENT

The primary issue in this case is whether damages under the United States Constitution should be recoverable for a landowner's injuries caused by the unlawful application of a local land use regulation temporarily denying the landowner its "reasonable, investment backed expectation" that it may put its land to a certain economic use previously approved by the local government.

With respect to that issue, the most consistent policy themes of petitioners and their *amici* are that a damages remedy would cause local fiscal ruin or loss of developmental control: they argue protection of the public treasury and local police power. Of course, the Fifth Amendment does not say: "nor shall private property be taken for public use, without payment of such compensation as may have been budgeted." It does not, by its language, exempt temporary takings from just compensation protections, nor does it excuse compensation on account of a substantial public purpose for the regulation. Yet, petitioners' arguments implicitly recognize that there are social policy choices involved in the selection of remedies. They recognize that the unstated question here is not simply whether the remedy is necessary or appropriate to protect the right secured, but whether it is also appropriate in light of the other social concerns it may advance or retard.

This brief addresses petitioners' unstated question from the perspective of a California landowner-developer which is engaged in establishing and maintaining a large-scale, master-planned, balanced community that accommodates not only the concerns of existing residents, but also attempts to satisfy market demand for a broad range of housing, to create employment opportunities matched to that housing, and to minimize adverse "spillover" effects on neighboring communities.

I

BECAUSE OF THE INADEQUACY OF STATE LAW VESTED RIGHTS DOCTRINE, A CLEAR CONSTITUTIONAL RULE IS NECESSARY TO PROTECT REASONABLE, INVESTMENT-BACKED EXPECTATIONS.

When a local government attempts to apply a new land use regulation to interfere with the completion of a previously approved project, the developer's challenge to the applicability of that regulation will generally be treated under state law as raising a question of vested rights. Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 Hastings L.J. 625, 625 (1978) [hereinafter Cunningham & Kremer, *Vested Rights*]. Although the statement of the vested rights rule is essentially the same in every jurisdiction, whether it is denominated as vested rights, equitable estoppel or under some other rubric, Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. L. Rev. 545, 547 (1979) [hereinafter Hagman, *Estoppel and Vesting*], the rule is applied inconsistently across the states. *Id.*; accord Cunningham & Kremer, *Vested Rights, supra*, at 626.

To understand the potential for inconsistent application of the vested rights doctrine to the same state of facts, one need look no farther than the present case. The lower courts applying Tennessee law found that Hamilton Bank's right to develop was protected by estoppel, even though Hamilton Bank lacked a building permit for the final phases of the project. Under California law, however, regardless of the level of infrastructure investment or the finality of approved plats, the Bank would likely have been found to have neither a vested right arising from its

prior approvals, nor a "property" interest protectable by estoppel.¹

Irvine submits that there is a fundamental difference between the doctrines of vested rights and estoppel, on the one hand, and takings jurisprudence, on the other. Because the vested rights doctrine arose in the context of small-scale projects taking only a few months to construct, the common law rules are singularly "unsuited to resolution of the complexities presented by modern, multi-phase, large-scale projects." Cunningham & Kremer, *Vested Rights, supra*, at 626-27.

The vested rights doctrine necessarily fragments a development project into discrete segments and identifies those portions, if any, for which a developer has the right to go forward and complete construction regardless of new government action or discovery of new facts. Application of this rule will have different consequences across the country. In California and other states with a "hard-vesting" rule, no permit or approval except the last one is sufficient to estop the government or to confer a vested right. Hagman, *Estoppel and Vesting, supra*, at 545-46. In other states, such as Tennessee, vested rights or facts

¹E.g., *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 790, 132 Cal. Rptr. 386, 389 (1976) (landowner had spent over \$2,000,000 on subdivision improvements and grading in reliance on the approval of a final subdivision map, but lacked approval for individual building permits); *Oceanic California, Inc. v. North Central Coast Regional Comm'n*, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), (despite dedication of a 120 acre park and demonstrated investment in improvements benefiting the entire 5200 acres scheduled for development pursuant to an approved master plan, the developer held no vested right for subdivisions that had not received final plat map approval, nor did owners of individual lots have a vested right to build single family homes in subdivisions that had received final approval prior to the enactment by initiative of the 1972 California Coastal Conservation Act).

giving rise to an estoppel will arise much earlier in the development process.

As the Court of Appeals below specifically held, however, this Court has previously determined that reasonable development expectations supporting a takings claim are defined apart from and independent of state law claims of estoppel. In its alternative holding, the Court of Appeals below declared:

Even if Hamilton had not had a vested right under state law to finish the development, its claim that a taking occurred would not necessarily be foreclosed. Instead of looking to see whether "rights" have been destroyed, the Supreme Court in zoning cases has engaged in an economic analysis of the *degree of interference* with "investment-backed expectations." . . . The jury was entitled to find that Hamilton and its predecessor in interest had a *reasonable expectation* that the development could be completed, in light of the evidence that the commission approved the preliminary plats on numerous occasions with the knowledge that a total of 736 units were intended. This was the developers' "primary expectation concerning the use of the parcel," *Penn Central*, 438 U.S. at 130, 98 S. Ct. at 2662, and was backed by considerable investment in land and improvements.

Hamilton Bank v. Williamson County Regional Planning Commission, 729 F.2d 402, 407 (6th Cir. 1984) (emphasis added).

In contrast to vested rights questions and their parcelized resolution, then, this Court has made it clear that under a takings analysis, in determining whether a developer has a property interest worthy of protection against a local government's application of land use regulations subsequent to initial approval of a project, the

reviewing court must examine the nature and extent of the developer's reasonable, investment-backed expectations with respect to the property *as a whole*. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978).

Irvine believes that it is now time for the Court to establish, by a clear, majority opinion, a Constitutional rule protecting a landowner's reasonable, investment-backed expectations in completing a previously approved project from government attempts to apply new rules in the middle of development. Such a rule is founded in the Constitution's command of fairness, *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 660 (1981); see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967), and notions of due process. For the Court to fail to promulgate such a rule would be to relegate interests that merit protection under the takings clause to the woefully inadequate or non-existent protection of inconsistently applied state law standards under the vested rights doctrine.

II

FUNDAMENTAL CHANGES IN THE NATURE AND SCOPE OF THE LAND DEVELOPMENT PROCESS HAVE OCCURRED OVER THE LAST FIFTY YEARS.

Beginning with the early decades of this century, a landowner's ability to develop land, which had previously been subject only to private restrictions and public nuisance doctrines, see Ragsdale & Sher, *The Court's Role in the Evolution of Power Over Land*, 7 Urb. Law. 60, 66-72 (1975), gradually became subject to public control through building codes, zoning laws and subdivision regulations. Cunningham & Kremer, *Vested Rights*, *supra*, at 630. In the 1950s these restrictions were extended by

state and federal pollution regulations. *Id.* Beginning in the late 1960s and early 1970s, however, there occurred an enormous expansion in the available array of environmental controls and mandatory municipal and regional planning restrictions. E.g., Hagman, *Estoppel and Vesting*, *supra*, at 577.

The traditional pattern of development in this country was to create "lots first, buildings later." Task Force on Land Use and Urban Growth, *The Use of Land* 246 (W. Reilly ed. 1973). That pattern permitted quantity construction at reasonable prices, because a prospective builder had a choice among lot locations and among sellers. *Id.* Because a subdivider of land could not know how, when or by whom his lots would be used, there was, however, "little incentive to plan for satisfactory social relationships or imaginative physical relationships between landforms and buildings." *Id.* at 246-47. The uncertainty of future use inherent in the "lots-first" process stimulated enactment of early Euclidean or grid zoning and subdivision regulations to curb potential negative effects arising from future development on nearby lots. The result was to reduce impacts upon neighboring development, but at the cost of further constricting the opportunity for imaginative development. *Id.* at 248.

The recent movement toward increased government regulation of land use was in part influenced by a desire to correct perceived deficiencies in the ability of market mechanisms to consider adequately the costs and benefits of proposed development, both locally and at a regional level. Such innovations as planned unit developments and master-planned, balanced communities, in which a broad range of housing is matched to a complementary range of local employment opportunities, represent a natural evolution in the land development process. Increased sophistication and capacities in the development industry, reflecting the industry's enhanced abilities to develop

and build larger scale projects, are responsible to a significant degree for the advent of today's flexible regulations, which can be applied by local government in a discretionary manner to deal with the special problems and opportunities presented by large-scale development proposals. *Id.*

The schematic for local land use regulations today consists of a hierarchy of planning and zoning overlays, coupled with a sequence of discretionary review steps, each of which must be completed before any grading of land or building of improvements can occur. At the top of this regulatory hierarchy stands the local government's General Plan, the community's paramount land use regulation.

In California, the General Plan is the local "constitution for all future development." *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965); Cal. Gov't Code §§ 65000 *et seq.* (West 1983). It consists of a variety of Elements — Land Use (generally in the form of a planning map and set of policies), Circulation, Housing, Seismic Safety, Noise, Open Space, etc. — which must be consistent, and which together constitute the community's statement for design and implementation of its ultimate goals: what that community finally will look like, and be like, demographically and in terms of its physical and social environment. All subsequent land use regulations, and all project-specific decisions, must conform to the General Plan and all of its Elements.

Under the General Plan are a series of progressively more specific, implementing regulations. The local government is authorized to develop Specific Plans, which are intended to allow identification of more specific policies for discrete areas of the community. Cal. Gov't Code §§ 65450 *et seq.* (West 1983). The local jurisdiction will have a zoning code, which will contain implementing

regulations for the General Plan. Cal. Gov't Code §§ 65800 *et seq.* (West 1983). If the zoning is of the master plan variety, it will also identify extra project approval and implementing procedures, as discussed below.

The community will have a subdivision ordinance, and possibly other similar ordinances (*e.g.*, a traffic phasing ordinance, or inclusionary housing ordinance), specifying those exactions, dedications, reservations, and other conditions that generally will have to be met in order for a landowner to subdivide land prior to development. Cal. Gov't Code §§ 66410 *et seq.* (West 1983). The city will have a grading code, building code, fire code, and electrical code further detailing developmental requirements. And, the city will have a locally adopted procedure for analyzing, at each discretionary review step in a project's course, the environmental consequences and constraints of the project.² Cal. Pub. Res. Code §§ 21000 *et seq.* (West 1983).

Each proposed development must be measured against this structure, through a sequence of discretionary reviews. The proposal may require amendments or variances from established planning and zoning regulations, which can only occur following public hearings and environmental review. The developer will have to obtain approval of a tentative and final subdivision map, unless it is seeking to improve a single lot. In order to record the final subdivision map, it will have to comply with the myriad conditions imposed upon approval of the tentative map: *e.g.*, dedicate land for parks or road rights-of-way, or pay an in-lieu fee (Cal. Gov't Code §§ 66475 *et seq.* (West 1983)); make improvements to adjoining or nearby streets, or bond for that work (Cal. Gov't Code § 66485

²State and Federal provisions impose additional requirements with respect to coastal resources, wetlands, air and water quality management, waste disposal, and similar matters.

(West 1983)); arrange for water and sewer connections, if not installation of new or larger mains, and install or bond for storm drain systems (Cal. Gov't Code § 66483 (West 1983)); provide for open space landscaping and maintenance; and satisfy whatever other conditions the city's planners and legislators deem appropriate. The developer will also have to prepare grading plans, interim run-off management plans, landscape plans (typically to a city-required landscape palette), and finally building plans, before the project can begin.

As noted above, in growing communities the modern trend in the land development process has been for the landowner to proceed by way of master plan zoning devices such as cluster development, as did the developer here, or through the more recent device of planned unit development. Planned unit development ("PUD") is a logical evolution in zoning law. Unlike Euclidean or grid zoning, which tends to treat land two dimensionally and encourage tract development, PUD zoning recognizes the differences in geology, terrain, and environmental factors that are found in larger projects, and recognizes that a community may be better served through an *integrated* mix of uses and residential types, sensitively designed to fit with the natural terrain and environment, than by tract development according to the city's standard zoning ordinance. PUD zoning will typically identify the developable and the undevelopable portions of the project area, specify the variety of uses allowed in the developable areas, establish tailored criteria for set-backs, lot sizes, streets, landscaping, drainage, use mixes, densities, and similar planning concerns, specify a method for phasing development, and require approval of a site plan or plans, and a master tentative map, as the vehicles for more precise development review and control.

Once the site plan or master tentative map has been approved, the *major infrastructure investment* for the PUD

(arterial roads for certain sets of phases, or the whole project, master storm drain systems, master water and sewer mains, reservoirs, etc.) is often required to be installed concurrently with the *first phase* of development, *together with dedications of open space for the whole PUD*, as was done for the present cluster development in case. These infrastructure investments and dedications are in keeping with the master planning effort, which focuses less on the specific needs of that first phase, than upon the project as a whole. And, separate, phase-specific subdivision maps, grading plans, site plans, and building plans consistent with the PUD and the site plan or tentative map will be still required for each subsequent phase.

Both the private developer and the public at large recognize significant benefits from the interaction between these ~~more~~ flexible approaches to land use regulation and the enhanced capability of the development industry to implement them. The ability to perform large scale projects increases the developer's incentives to provide thoughtful, thoroughly planned development. Because the developer realizes that its profits will come from the project as a whole, and slowly over a period of years, or even decades, there is thus a significant incentive toward developing projects of enduring quality, which will maintain or enhance the developer's ability to achieve a satisfactory return on its investment.

Moreover, PUDs and planned community developments, because they permit a developer to offer a mix of uses (*e.g.*, residential, commercial and industrial) and a mix of product lines within use types (*e.g.*, different housing products over a broad range of prices, or diverse opportunities for commercial tenancies), enable a faster absorption schedule, while simultaneously reducing carrying costs and financial exposure in an industry which is

particularily sensitive to changes in the economy. Wither-spoon, Abbott & Gladstone, Mixed Use Developments: New Ways of Planned Use, in Urban Land Institute, 4 *Management and Control of Growth* 240, 243 (Schnidman, Silverman & Young eds. 1978). In turn, the industry's new capability for large-scale development permits local governments to apply more sophisticated techniques in evaluating proposed projects. Among other things, this enables local governments more easily to evaluate the cumulative environmental impacts and other consequences of proposed development. *Id.* at 250. The magnitude of large-scale projects also enhances local government's opportunity to plan for and to provide a full range of urban facilities and services. *Id.* at 249.

Thus, before a project can reach the point where ground is first broken, it will have undergone intensive and exhaustive public scrutiny and have received repeated public approvals. On the basis of those approvals, the landowner will have had to make a substantial investment, at the time of the subdivision map approval for the first phase and at the local jurisdiction's direction, of public and private infrastructure improvements required on the basis of the project as a whole.

Irvine believes that this is a generally beneficial process. During the course of public review and approval, both public and private planning resources are brought together in a manner aimed at optimizing the benefits and minimizing the adverse impacts of the proposed development. As a result of its participation in this process, the landowner/developer's expectation, at least once the master tentative map or site plan is approved and the City's initial exactions met, is that it has obtained sufficient public sanction and definition of its project development plan to have that plan merit protection as one of the

identifiable "sticks" in the bundle of rights called "property," to which Fifth Amendment protection will apply. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

III

THE FULL POTENTIAL OF ENHANCED DEVELOPMENT CAPABILITY IS NOT PRESENTLY BEING RECOGNIZED.

There is a pressing need for new housing. In California alone, approximately 280,000 new housing units need to be built annually between 1983 and 1990 just to meet existing growth demands of new families; 385,000 housing units are so substandard they need to be replaced; another 875,000 units are presently in need of rehabilitation. *Recommendations To Improve The Implementation of the California Environmental Quality Act: A Report to the Governor From the CEQA/Housing Task Force*, at 1 (1984) [hereinafter "CEQA Recommendations"].

Despite the development of innovative techniques which have greatly enhanced the potential for large-scale development, the demonstrated demand for new housing is not being satisfied. The reasons for failure appear to lie largely within the regulatory process.

One consequence of the interaction between the array of new land use regulatory devices and the complexities of large-scale development has been a substantial lengthening of the development process. A recent study by the U.S. Government General Accounting Office found that the average length of time nationwide for residential project approval was 7½ months. U.S. General Accounting Office, *Why Are New House Prices So High, How Are They Influenced by Government Regulation, and Can Prices Be Reduced?* (1978). The length of the development process is considerably extended beyond the nationwide average in those states with the most comprehensive

regulation of land use. *The Report of the President's Commission on Housing* 182 (1982) In some California cities permit approvals can take up to three years. *Id.*³

The consequences of this lengthening of the development process are disturbing and far-reaching. Recent empirical evidence suggests, for example, that the present level of regulation has significantly increased the cost of housing.⁴

³This data is confirmed by published California cases. E.g., *City of Del Mar v. City of San Diego*, 133 Cal. App. 3d 401, 404 n.1, 183 Cal. Rptr. 898, 900 n.1 (Cal. Ct. App. 1982) (City of San Diego took nine years to complete initial planning approval for first phase of North City West planned community development). Judicial review of the City of Del Mar's challenge to those approvals, which did not yet authorize construction, *id.* at 405, 183 Cal. Rptr. at 901, took an additional three years.

⁴See generally, *Land Use and Housing on the San Francisco Peninsula*, 4 Stan. Envt'l L. Ann. (1982) [hereinafter *Land Use and Housing*]. *Land Use and Housing* contains studies of the communities located on the mid-San Francisco peninsula, an area since the mid-to-late 1960s dedicated to aggressive land use regulation, and in which housing prices in 1981 had risen to amounts 71 percent higher than the national average. *Id.* at 6. One study reported in *Land Use and Housing* found that growth controls in the greater Bay Area were responsible for 18 to 28 percent of housing price increases. Rosen & Kranz, *Growth Management and Land Use Controls: The San Francisco Bay Area Experience*, 9 AREUEA J. 321, 342 (1981), cited in Ellickson, *Preface to Land Use and Housing*, *supra*, at 17-19. Accord Elliott, *The Impact of Growth Control Regulations on Housing Prices in California*, 9 AREUEA J. 115 (1981) (comparative examination between cities without stringent growth controls, cities with growth controls but in an otherwise non-restrictive county, and growth control cities surrounded by other growth control cities), cited in Ellickson, *Preface to Land Use and Housing*, *supra*, at 19:

Using house price data for the 1968 to 1976 period, [Elliott] found that trends in house prices slightly trailed the rate of inflation in cities that did not stringently control growth, and only slightly outpaced inflation in growth-control cities located in counties that did *not* control growth. Elliott's most interesting and powerful result, however, was that where *both* a city and the surrounding

Our courts have been slow to recognize another major consequence resulting from the recent evolutionary changes in the nature of the land development process. Major infrastructure costs, previously at least shared by the established community through property taxes, have been shifted to the developers of large-scale projects and have substantially increased the magnitude of development costs. Because these increased development costs must be amortized across the development of an entire project over a period of years, rather than months, there has been a concomitant increase in the severity of the risk that a government will attempt to change the development rules in midstream.

The courts, however, are still applying common law vested rights rules developed to deal with small-scale, short-term development. In light of the increased risk of loss, these rules provide inadequate protection to justify investment in large-scale planned development. The predictable result is that such development is unnecessarily constrained:

"[R]ecent experience [indicates] that many of the large-scale development techniques used in the late 1960s and early 1970s will probably not be used again in the foreseeable future. This especially applies to the purchase of very large tracts of land and the investment of large sums of money in major

county stringently controlled growth, the city's house prices were 50 percent higher in 1976 than they would have been had they just kept pace with inflation."

See also Mercer & Morgan, *An Estimate of Residential Growth Controls' Impact on Housing Prices*, in *Resolving The Housing Crisis* 189 (M. Johnson ed. 1982) (one quarter of rise in house prices in Santa Barbara during 1972-1979 due to growth controls); *The Report of the President's Commission on Housing*, *supra*, at 181 & n.3; *CEQA Recommendations*, *supra*, at 4, (each month of delay in the processing of a housing development proposal adds one to two percent to the cost of the housing).

public facility improvements prior to the marketing of properties to consumers. Most knowledgeable persons in the industry now agree that projects which use these techniques will not be viable when there is extensive regulation of development at the local level and cyclical variations in the national economy. All current evidence points to the fact that the private sector simply will not initiate many large-scale projects in the future, if present public policies are continued. Upward pressure on development costs due to labor and material price increases have always been problems, but they are problems which the development industry has the capacity to adjust to in a slowly improving economy. It can be expected that current constraints on development due to market uncertainties will be overcome and development will resume. The uncertainties and related cost impacts of new public policies, however, are problems of an entirely different magnitude, and the industry has no apparent way to adjust except to reduce other risks by undertaking only smaller projects of very short duration."

Urban Land Institute, *Large Scale Development 3* (1977).

The present situation poses a severe public policy dilemma. On the one hand, no one wishes to expose municipalities to the threat of harsh fiscal penalties in the event of the proper exercise of their land use regulatory powers. On the other hand, the nature of modern land development requires a much greater degree of certainty, at an earlier time in the development process, than is available at present.

The current uncertainty over whether reasonable investment expectations will be protected, and what that protection will entail, encourages only short-term, incremental development that in no way furthers orderly, comprehensive land use planning and careful project

design and implementation. The practical consequence is thus actively to promote the very perceived deficiencies in the operation of economic markets that innovative land use regulation and long-range planning techniques were created to ameliorate or cure.

If land use regulation is to achieve its stated intent of encouraging master-planning, then the current disincentives for long-term, large-scale projects must be overcome. It is an exercise in futility and a waste of government resources to establish elaborate state and local planning programs if, in reality, few prudent developers will commit themselves to cluster housing, planned unit developments, planned communities, or phasing of infrastructure improvements. Yet, the current state of the law provides inadequate protection for large-scale development. Irvine submits that only a clear Constitutional rule will provide the necessary protection.

IV

PETITIONERS' POLICY ARGUMENTS AGAINST A DAMAGES REMEDY ARE WITHOUT SUBSTANCE.

Petitioners and their *amici* argue that should the Court be disposed to announce a Constitutional rule protecting landowners' reasonable, investment-backed expectations from local government's attempts to change development rules in midstream, the sole remedy should be the practical non-remedy of invalidation of the offending ordinance. In support of this proposition, they advance fiscal and police power policy arguments against establishing a damages remedy for temporary regulatory takings. Their time-worn arguments fail for two reasons: they lack empirical support; and even assuming the validity of such policy considerations, they are insufficient by themselves.

to support suppression of a damages remedy, when compared with the broader range of social concerns that should be appropriately considered by the Court.

A. A Damages Remedy Will Not Bankrupt the Public Treasury.

The most frequent policy consideration advanced by petitioners and their *amici* is that imposition of a damages remedy for temporary regulatory takings would bankrupt the public treasury by imposing an unimaginably large liability upon local governments. Brief Amicus Curiae of City of New York at 11-13; Brief Amicus Curiae of National Association of Counties, et al., at 6; Brief Amicus Curiae of City of St. Petersburg, at 13 n.21.⁵

Petitioners and their *amici* cite no evidence whatsoever in support of this assertion. Notwithstanding the fact that several states, including Tennessee, permit damage recoveries in inverse condemnation, see Brief Amicus Curiae of the United States, at 11, petitioners and their *amici* point to no reported evidence of such raids on public funds. If catastrophic fiscal consequences indeed are threatened, reported cases should contain illustrations of the problem. The absence of such reports, or of empirical studies supporting this premise, leads one to the conclusion, as expressed by one commentator, that this "notion . . . is sheer hyperbole." Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in*

⁵In a related claim concerning adverse fiscal consequences, California pleads that the Tahoe Regional Planning Agency lacks *insurance* against the possibility of damage awards for temporary takings. Brief Amicus Curiae of State of California, et al., at 16 n.8. Strangely, however, the briefs of petitioners and their *amici* are silent as to the availability of insurance against takings damage awards, either in general, or in the instant case. The potential availability of such insurance has been advanced as a factor mitigating or eliminating the fiscal consequences argument. E.g., Note, *Money Damages for "Regulatory Takings,"* 23 Nat. Res. J. 711, 723 (1983).

Challenging Land Use Regulations, 29 U.C.L.A. L. Rev. 711, 731 n.124 (1982) [hereinafter *Just Compensation*]. Accord Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 87 n.415 (1983).

Moreover, recent judicial experience with damage actions brought under 42 U.S.C. § 1983 suggests that the general imposition of constitutional tort liability upon local governments poses no major threat of increased costs. *Owen v. City of Independence*, 445 U.S. 622, 656 (1980); Bauman, *supra*, at 87 n.415; Comment, *Just Compensation*, *supra*, at 727. There is no reason to suppose that the likelihood of potential interim damages liability for temporary regulatory takings will begin to approach the magnitude of damages exposure for all constitutional torts subsumed under Section 1983 litigation.

B. The Availability of a Damages Remedy for Regulatory Takings Will Encourage, Rather than "Chill," Responsible Long-Range Planning.

Petitioners and their *amici* also argue that the specter of interim damages will chill long-range planning because local governments will be unable to *consider* applying remedial legislation to halt previously approved development upon discovery of changed circumstances or newly discovered facts, and, further, that local governments will be unable to react to emergencies. E.g., Brief Amicus Curiae of City of New York, at 9. This assertion is a straw man argument of the worst sort.

No one can seriously suggest that government should be prevented from acting freely to further sincere, newly discovered public health and safety concerns, especially those of an emergency nature. *Penn Central*, 438 U.S. at 125-26. The difficulty with petitioners' position is that in

practice it is advanced, not with respect to changed circumstances or newly discovered public health and safety concerns, but rather with respect to newly "discovered" public welfare concerns, i.e., where the government has merely changed its mind after having approved a project and encouraged or required a developer to undertake substantial investments toward development. See Brief Amicus Curiae of The National Association of Counties, et al., at 6-7.

Imposition of a damages remedy simply would not have the "chilling effect" envisioned by petitioners. As numerous commentators have noted, and indeed as this Court has previously recognized, the reverse is true. Responsible long-term planning would instead be promoted by imposition of an interim damages remedy for regulatory takings. *San Diego Gas & Electric*, 450 U.S. at 661 n.26 (Brennan, J., dissenting).

The availability of an interim damages remedy for subsequent governmental vitiation of prior approvals should, while discouraging last minute changes of mind, simultaneously encourage local governments to give more careful consideration to the consequences of proposed development projects at the initial application stage. There is at present no effective incentive to encourage local governments to give early, careful and comprehensive consideration to applications for proposed development. Comment, *Just Compensation*, *supra*, at 731 (the fact that a local government knows it has no liability exposure may be an express disincentive to responsible public planning); Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 Stan. L. Rev. 779, 795 (1976).

While an "interim damages" remedy might have some effect of delaying initial development approval or denying approval entirely in marginal cases, developers will be more able to forecast overall development risks. Thus,

although the planning and processing costs necessary to secure initial project approval may increase somewhat, the resulting decrease in uncertainty should encourage additional construction of better planned, *needed* development.

Perhaps the major failing of petitioners' policy analysis, however, is their one-dimensional focus on the concerns of a single interested party in the land development process — upon the local government, as representative of the established "public interest." Unfortunately, there is great potential that even the best-intentioned local government will inadequately consider the needs of non-residents, and such other greatly outnumbered minority interests as landowners/developers, in reaching its determination of the "public interest." See Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 404-06 (1977).

The tension in land use cases in the larger sense, then, is not simply between private profit and the police power, but rather between the values of the existing community and the needs of those who have not yet joined it, as perceived by the supplying marketplace. It is important to remember that although development is a production business, the "commodities" provided by development are not widgets. They are workplaces, marketplaces, recreation facilities, and most importantly housing, as in this case. These commodities are as essential to our existence as is a grand vista, or "a quiet space where yards are wide, people few and motor vehicles restricted." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

THE COURT SHOULD DEFINE CRITERIA FOR APPLYING AN INTERIM DAMAGES REMEDY BASED ON THE DOCTRINE OF REASONABLE, INVESTMENT-BACKED EXPECTATIONS.

Where government has improperly interfered with investment-backed expectations, under what circumstances should there be compensation for that interference? The following subsections suggest criteria for determining interim damages by focusing on an explication of the terms "reasonable" expectations and "investment-backed" expectations.

A. The Developer's Expectations Must Be Reasonable.

1. The Application of the Challenged Regulation Must Occur Subsequent to Project Approval.

The present case involves a claim of temporary interference with the development of a project arising from an attempt to *apply* new and more limiting regulations to the Temple Hills cluster housing development subsequent to its initial approval. It does not raise the question of whether mere enactment of a land use regulation is a taking. Rather, it involves only the question of the reasonableness of expectations arising from a development approval under one set of regulations, and a local government's subsequent efforts to *apply* different regulations at odds with that approval.

This case considers only the impact of an attempt to truncate an approved project in midstream. Therefore, one criterion to be applied in determining whether an award of interim damages is appropriate should be that a developer's "reasonable expectations" only arise from the developer's acts subsequent to the local government's initial review and approval of a project.

2. Reasonable Expectations do not Encompass Hazardous Conditions or Public Nuisances.

If the question had ever been in doubt, *Penn Central* made it clear that local governments have considerable latitude when it comes to regulating potential harms, such as hazardous waste disposal, and dangerous conditions, such as flood plains. 438 U.S. at 125-26. Another necessary criterion, therefore, is that a developer has no reasonable expectations vis-a-vis regulations which halt previously approved development for legitimate public health and safety concerns discovered following initial approval, or which abate public nuisances.

B. The Developer's Expectations Must Be Backed By Investment.

1. In Commencing Development, the Developer Must in Fact Have Relied Upon Governmental Approval for a Defined Project.

The developer must have taken some definite steps to define and present the overall parameters of the development project to the local government, which resulted in some demonstrable governmental approval defining the overall scope of the project. In the present case the "planning commission approved plans for the development on numerous occasions, and there is considerable evidence that the planning commission intended to and did approve a maximum of 736 units." *Hamilton Bank*, 729 F.2d at 407. The Bank's in-fact reliance upon the prior approvals is evidenced by the fact that between 1973 and 1979 the Bank's predecessor in interest spent between three and five million dollars on project improvements. Brief for Respondent in Response to Petition, at 3.⁶

⁶ *Avco* provides a strong contrast and an illustration of the necessity for project definition. One of the major factual questions underlying the decision in *Avco* was the vagueness of the development project for

2. The Investment Should be Demonstrable and Foreseeable.

Most typically a developer's project-wide investments will be made in services (*e.g.* roads, water lines, sewers), the payment of fees (*e.g.*, school fees, in-lieu fees for low and moderate income housing, or park fees) and/or the dedication of land (*e.g.*, for fire stations, schools, parks). Where the developer's investments are of a more generalized nature, (*e.g.*, purchases of materials not physically implanted on the project site, soft costs), the developer should be required to prove that those investments were unique to the approved project, and not transferrable to other property. *See Cunningham & Kremer, supra*, at 716. The developer should be required to bear the burden of tracing each of the foregoing investments back to the development approval and of demonstrating that each was inherent in proceeding into the development process.

C. Government Should Be Given a Legislative or Administrative Opportunity to Modify or Rescind Its Action Before a Damages Remedy Can Be Invoked.

Irvine concurs with the holding in *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cited by the dissent below, that "the municipality's governing body" should be "given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity." 643 F.2d at 1200. Given the potential for incurring municipal liability, the local government should be fully apprised of the developer's claim and should be given an opportunity, by means of the developer's resort to the local government's administrative or legislative review process, to decide whether to run the risk of potential liability for

which Avco claimed governmental authorization: there was conflicting documentation as to whether the developer planned to construct 1300, 1600 or 1900 units. 17 Cal. 3d at 794 n.4, 132 Cal. Rptr. at 392 n.4.

interim damages or to rescind or otherwise modify the application of the regulation questioned by the developer. The developer's participation in the local government's review process would put the local government on notice of a potential interim damages claim.⁷

This "notice and opportunity to correct" requirement is analogous to the exhaustion of administrative remedies doctrine. It should not, however, include a requirement of proceeding to litigation as a means of placing government on notice. The time period during which damages are incurred should commence upon conclusion of the local government's legislative or administrative review process and not at the conclusion of litigation demonstrating the impropriety of the local government action. In other words, the opportunity allowed a local government to modify or rescind its action in order to forestall absolutely an interim damages award should end upon conclusion of the local government's legislative or administrative review, rather than upon its subsequent opportunity to rescind under the dictates of a court-ordered remand. Otherwise, a local government could cause a developer substantial economic harm without incurring any costs other than litigation costs arising from its unsuccessful defense of its regulatory action. Under an approach requiring exhaustion of judicial remedies prior to invoking an interim damages remedy, most of the deterrent value of a damages remedy would be lost.

⁷It should be noted that, as suggested, Hamilton Bank did exhaust its remedies in the local government's review process. The Bank's representatives appeared at the November 11, 1980 meeting of the Williamson County Board of Zoning Appeals seeking a ruling that the Bank was entitled to go forward under the 1973 regulations. (C.A. App. 518-33). Although the Board of Zoning Appeals ruled in the Bank's favor, petitioners refused to follow that ruling, and declined to approve the Bank's plat map. (*Id.* at 580).

D. The Measure of Interim Damages Can Be Objectively Determined in an Expeditious Manner.

The dissent in *San Diego Gas & Electric* suggested that “[o]rdinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary ‘takings’ involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory ‘taking.’” 450 U.S. at 658-59. Although the measures of compensation cited by Justice Brennan would be perfectly appropriate, Irvine suggests that the Court consider investing the trial court with discretion to use simplified measures of interim damages as warranted by the facts of each case.

The “carrying costs” of a project can be objectively determined without elaborate appraisal procedures other than a mutually agreed upon accounting process. The carrying costs of road, water and sewer systems attributable to development potential that has been delayed can be easily calculated. Similarly the value of fees, including lost interest, attributable to regulatory delay can be objectively determined. The value of dedications and of land left undeveloped for the period of delay could be defined in terms of the difference between annual rental value for the property as it could have been validly regulated and the annual rental value as it was actually regulated. *Windfalls for Wipeouts* 296 (D. Hagman & D. Misezynski eds. 1978) [hereinafter Hagman, Compensable Regulation]. Thus, in many cases it would seem unnecessary to undertake elaborate eminent domain valuation proceedings to establish the measure of interim damages.*

*As a corollary to their “chilling effect” policy argument, petitioner’s amici suggest that judicial recognition of an interim damages remedy for regulatory takings will expose local governments to a multiplicity of actions by frustrated or failed developers and result in a substantial

CONCLUSION

Judicial application of state law vested rights doctrine provides insufficient protection for needed development. Changes in the land development process and in the nature and extent of government regulation of land use have fostered a degree of uncertainty which seriously hampers responsible land development practices, especially where long-term, master-planned projects are involved. A uniformly applied, federal Constitutional right and remedy for temporary takings based upon recognition of the developer’s reasonable investment-backed expectations is required. Irvine believes that an “interim damages” remedy can be fashioned and drawn with sufficient precision to afford relief to affected landowners while not causing dire fiscal consequences for local government or creating a “chilling effect” on local government regulation of land development. Such a remedy can be narrowly defined with a measure of damages that can be calculated

increase in costs to local government in the form of litigation expenses. Brief Amicus Curiae of the National Association of Counties, et al., at 7; Brief amicus Curiae of State of California, et al., at 19 & n.9. Such an argument is disingenuous at best.

As this Court is well aware, city attorneys have traditionally viewed the merry-go-round of regulation, litigation, and reregulation as a relatively costless technique for control of development. *San Diego Gas & Electric*, 450 U.S. at 655 n.22 (quoting remarks of James Longtin, city attorney for the City of Thousand Oaks, California, before the 1974 annual conference of the National Institute of Municipal Law Officers). Accord Hagman, Compensable Regulation, *supra*, at 293; Kmiec, *Regulatory Takings: The Supreme Court Runs out of Gas in San Diego*, 57 Ind. L.J. 45, 51 (1982); Comment, *Just Compensation*, *supra*, at 732-34.

One suspects, moreover, that few developers will be willing to “chill” their future relations with local government by prosecuting damage suits. Thus, seriously pursued interim damages actions would seem to be very unlikely in all but the most egregious instances.

in an objective manner without elaborate proceedings.
Irvine urges the Court to so hold.

Dated: December 14, 1984.

Respectfully submitted,

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